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Supreme Court of the United States

OCTOBER TERM, 1968

No. 755

INTERSTATE INVESTORS, INC., *Plaintiff, Appellant,*

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

TRANSCONTINENTAL BUS SYSTEM, INC., *Intervenor-Defendant, Appellees.*

ON APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF TRANSCONTINENTAL BUS SYSTEM, INC. TO DISMISS OR AFFIRM

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January 6, 1969

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Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

INTERSTATE INVESTORS, INC., *Plaintiff,*
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—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

TRANSCONTINENTAL BUS SYSTEM, INC., *Intervenor-Defendant,*
Appellees.

ON APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF TRANSCONTINENTAL BUS SYSTEM, INC. TO DISMISS OR AFFIRM

Intervenor-defendant-appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal of Interstate Investors, Inc. from the order of the District Court affirming Interstate Commerce Commission orders dated August 10, 1966 on the ground that plaintiff-appellant lacks the requisite standing to prosecute this appeal, or alternatively, to affirm the said orders of the District Court on the ground that it is manifest that

the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Questions Presented

1. Does appellant, an investment company, have the requisite standing to seek review in this Court of Interstate Commerce Commission orders granting applications of intervenor-defendant-appellee, a major bus company, for control of three regional bus companies, where appellant:

(a) claims no interest whatever with respect to two* of the three regional bus companies over which control is sought,

(b) sold and released for $25,425 any and all interest or expectancy of any kind whatsoever which it may have had in the third bus company** and retained and has never returned or offered to return the said $25,425; and

(c) is not and never has been an owner or operator of any bus company or other carrier.

2. Was the three-judge District Court correct in its unanimous holding that the orders of the Interstate Commerce Commission granting intervenor-defendant-appellee's applications for control were based upon substantial evidence and were not tainted by any fraud?

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* Virginia Stage Lines Inc. (Virginia); Safeway Trails Inc. (Safeway).

** Queen City Coach Co. (Queen).

Statutes Involved

The statutes involved are set forth at pages A134 to A146 of the appendix to appellant's Jurisdictional Statement.

Statement

This is a direct appeal from an order entered on July 22, 1968 by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325 dismissing appellant's complaint, which sought to set aside various orders of the Interstate Commerce Commission.

On May 7, 1964 Transcontinental Bus System, Inc. (Transcon) applied under Interstate Commerce Act § 5, 49 U.S.C. § 5, to acquire control of Virginia and Safeway (A41).* On March 26, 1964 Transcon had contracted to acquire the controlling stock of Virginia, and on April 22, 1964 had made a similar contract for the acquisition of Safeway stock (A47-A48).

Subsequent to the making of these contracts and applications for control, and as an independent matter, Transcon contracted on May 21, 1964 (as of May 16, 1964) for the acquisition of the shares of Queen (R. 53-Exh. 14). On June 5, 1964 Transcon applied to the I.C.C. for authority to control Queen.

All three contracts provided that the shares to be purchased would be deposited with a depositary bank which would issue transferable receipts therefor. Each contract

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* Pages of appellant's Jurisdictional Statement are indicated by "JS", the appendix to the Jurisdictional Statement by "A", the Record on Appeal by "R", and the appendix to this motion by "a".

provided that the purchase agreement was to be consummated only after the I.C.C. and all other applicable regulatory bodies had approved the proposed exchange of stock, and each contained a condition precedent to the consummation of the agreement that the selling stockholders shall have received from the Internal Revenue Service a ruling that the exchanges of stock contemplated by the contract would not give rise to recognition of any gain or loss for federal income tax purposes.

On July 20, 1964 the I.C.C. consolidated both of Transcon's applications under the Interstate Commerce Act § 5(2) for acquisition of control, and two additional applications under the Interstate Commerce Act § 20(a) for authority to issue the necessary stock with which to acquire Virginia, Safeway and Queen.

Hearings on this consolidated record were held on September 9, 10, 11, 14 and 15 and on October 26, 27, 28 and 29, 1964. Interstate appeared in opposition to Transcon's application to acquire Queen (R. 53-Tr. 8, 9, 90), and from the conclusion of the hearings on October 29 until the issuance of the final order of the I.C.C. on August 10, 1966 it filed two briefs, one set of exceptions, 15 motions and six petitions in opposition to Transcon's applications.

Between June 15, 1964 and August 23, 1965 Highway Insurance Company (Highway), a subsidiary of Transcon, purchased a total of 2004 depositary receipts representing approximately 9% of the outstanding shares of Queen (A167).

In November 1964 Transcon furnished the Bureau of Enforcement of the I.C.C. with all records relating to the purchase by Highway of the 1387 depositary receipts it had purchased by that time (R. 53-Reply of Transcon,

11/5/65, p. 5; R. 53-Reply of Transcon, 12/27/65, p. 12; R. 53-Reply of Transcon, 2/14/66, p. 35; Answer of Transcon, 8/9/65; Reply of Transcon, 1/24/66). In June 1965, four months before the filing of the hearing examiner's report, Transcon filed Exhibit No. 168 (49a-57a R. 53-Exh. 168) showing that Highway had acquired depositary receipts representing 1,387 shares of Queen and 829 shares of General Realty, a corporation affiliated with Queen. Thus, the hearing examiner was aware before he filed his report that Transcon had acquired certain rights to Queen stock (A126).

On October 19, 1965 the hearing examiner filed his 33-page report approving Transcon's applications for acquisition of control of Virginia, Safeway and Queen (A77-A133). On August 10, 1966 the Commission authorized Transcon to acquire the three bus companies and (a) found that the acquisitions would substantially increase the operating efficiencies of the company, would permit substantial cost savings and would facilitate the implementation of through service (A65-A66); (b) found that the acquisitions would result in an elimination of a minimal amount of competition and would greatly strengthen the competition in the eastern part of the U. S. against Greyhound Lines Inc. (Greyhound) (A64); (c) concluded that the proposed acquisitions would be in accord with the Commission's long standing policy of fostering combinations where the result would be to improve the national transportation system and strengthen competition to Greyhound (A64-A66), and also (d) concluded that the purchase by Transcon, during the pendency of its application to the I.C.C., of certain deposit receipts for Queen stock would not bar approval of the proposed acquisition (A60).

Summary of Argument

1. Interstate is without standing in this Court to challenge the judgment of the District Court or the orders of the Commission because it has no interest of any kind whatsoever in Virginia or Safeway and sold for $25,425 on February 18, 1965 whatever interest it may ever have had in Queen.

2. The proper measure of the legality of Transcon's acquisition of the three carriers is not the antitrust laws, but Section 5 of the Interstate Commerce Act. The Commission under Section 5 properly considered the question of the anticompetitive impact, if any, of the acquisitions and concluded, on the basis of substantial evidence, that the acquisitions would be in the public interest as a result of benefits accruing from improvements in transportation and the resulting increase in competition.

3. The Commission's decision was not tainted by fraud. There was no fraud on Transcon's part. Interstate in charging fraud has misrepresented the facts in a number of material respects, including the unconscionable distortion of the testimony of Transcon's witness Scheitel by completely altering the context of his allegedly false answer to make it appear that the answer was a denial of knowledge of the purchase of *depositary receipts* instead of a denial of knowledge of the purchase of *Queen stock* (see pp. 49-51 *infra*).

ARGUMENT

POINT I

Interstate Lacks Standing to Obtain Judicial Review of the Interstate Commerce Commission's Orders.

The District Court expressed the view that "plaintiff has no interest at all in the acquisition of Virginia and Safeway" (A37). As to Queen, an intercity carrier with net assets in 1964 of $6,619,168, the court concluded that Interstate had contracted away its rights, and that the proper way to raise the question of the validity of its contract releasing its rights would be in a proceeding in the Western District of North Carolina (A38).

Interstate is not an intercity carrier of passengers or freight. It has never owned a single bus, and it has never carried a single passenger. It is not a competitor, a shipper, or a customer of Safeway, Virginia or Queen. Interstate's sole and only contact with the intercity bus industry and the sole basis upon which it predicates its standing to challenge the ICC orders in this case is this: Interstate claims once to have had an oral contract to purchase the controlling shares of Queen. (JS 77, 79) It is this which Interstate denominates a "tangible contractual expectancy" (JS 79).

Whatever contractual expectancy Interstate may have had when the ICC hearings commenced in September 1964 terminated on February 18, 1965. Shortly following the announcement of Transcon's contract to acquire Queen, Interstate brought an action in the Western District of North Carolina to recover $2,300,000 damages for an al-

leged breach of Interstate's alleged oral contract to purchase Queen. Named as defendants were Queen, an affiliate (GRIC) and the Queen shareholders who had allegedly orally contracted to sell their Queen stock to Interstate. In September 1964, after institution of the North Carolina lawsuit, Interstate appeared before the I.C.C. to oppose Transcon's applications, but did not file an application to acquire control of Queen. On February 18, 1965, Interstate, through its President and principal stockholder, Mr. Burt, accepted $25,425 in cash in full discharge of any and all liability of the Queen shareholders to Interstate. In exchange for the $25,425, Interstate executed eight general releases, including one to Transcon, and a petition to withdraw all opposition to the I.C.C. proceedings, and consented to the entry of judgment of dismissal with prejudice of its contract action.* Interstate has never returned

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* The release to Queen (29a R. 55-14, pp. 3, 4) states that Interstate and Mr. Burt, as part of the settlement and in consideration of $25,425 paid to Interstate, release and discharge Queen from all claims and causes of action, including but not limited to claims and causes of action on contract or for breach of contract, in tort, claims and causes of action arising under the antitrust laws and any other Federal or State statute or law which Mr. Burt or Interstate then had or would thereafter have growing out of occurrences from the beginning of the world until the day of the release. The releases further stated, "Interstate Investors, Inc. and William R. Burt agree that neither of them will, in the future, directly or indirectly do anything to hinder or delay favorable action by the Interstate Commerce Commission, or any member, agent or agency of said Commission, upon the pending application for approval of said exchange of stock of Queen City Coach Company for stock of Transcontinental Bus System, Inc.; and the undersigned recognize that this agreement precludes them from making any request or suggestion that any other person, corporation, governmental agency or governmental employee do anything to oppose, hinder or delay such approval." (R. 55-14, p. 2) In addition to the releases Mr. Burt, on behalf of Interstate, executed a request for leave to withdraw from the proceedings before the ICC. (R. 55-15) Further, Interstate agreed to the entry of a judgment dismissing with prejudice its action in the Western District of North Carolina. (R. 55-16)

or tendered the $25,425 it received. It has never appealed the judgment against it. It has never brought a proceeding to rescind the releases it executed.

The effect of this settlement, comprising the releases, the undertaking to withdraw opposition to the ICC proceeding and the judgment of dismissal with prejudice, was, among other things, to discharge all claims of Interstate against the Queen stockholders and Queen. The three judge District Court described the effect of this settlement as follows:

> "* * * while Interstate might have had standing under its contract to purchase Queen, it now appears that it contracted that right away. The releases required by the settlement, if valid, completely discharge any liability the Queen shareholders might have had to sell their stock to Interstate." (A38)

There can be no question that Interstate knowingly and voluntarily entered into the February 18, 1965 settlement. Interstate decided to settle because it was concerned that the District Court was about to enter summary judgment against it, and because it regarded the offer of $25,425 as a "substantial monetary settlement." (11a R. 55-9, letter, 2/2/65, Burt to Mrs. Armes, Acting Secretary, ICC, pp. 2, 3; 15a R. 55-10, letter, 2/4/65, Burt to District Judge Craven, pp. 1, 2). Immediately following the execution of the settlement papers, Mr. Burt, who is a member of the New York and D. C. Bars went before District Judge Craven and the following took place:

> "Mr. Nicholson [attorney for Interstate]: Your Honor, I am pleased to state to the Court that a voluntary settlement satisfactory to our client has been entered into and the papers have been signed.

"Court: I am pleased, too. In view, however, of Mr. Burt's letter to me I want to inquire of him if this is one that is indeed satisfactory and I don't want him to settle this case if he feels in the slightest coerced by this Court because such a settlement is a terrible thing.

"Mr. Nicholson: He has expressed to me his satisfaction of the settlement.

"Mr. Burt: Yes, sir, I'm pleased with the settlement that has been worked out." (24a R. 55-13, p. 2).

The court's question was prompted by Mr. Burt's *ex parte* letter to District Judge Craven on February 4, 1965 in which Mr. Burt raised the question of whether Interstate had "had a fair day in court on the basis of which the settlement was evolved." Mr. Burt charged the District Judge with having threatened the entry of summary judgment for the defendants if the matter were not promptly settled. In Mr. Burt's own words to District Judge Craven:

"* * * you were mousetrapped into expressing your views on the merits prior to fair opportunity having been accorded plaintiff to permit it to develop an adequate factual record * * *

"Counsel for defendants had indicated that you were instrumental in defendants setting the limits of their settlement offer and you, of course, know the pressure that has been exerted on Mr. Nicholson [Interstate's attorney] by the possibility that the boom would be lowered within a matter of hours on plaintiff [Interstate] in the form of entry of the granting of the motions for summary judgment by defendants unless settlement was reached." (16a R. 55-10, p. 2)

Interstate fully recognizes that the settlement, if honored, discharges Queen and its stockholders from all liability arising out of Interstate's alleged oral contract and thus effectively terminates any interest it may have had in Queen. It now seeks to evade the binding effect of what happened on February 18, 1965 by representing to this Court that Transcon delayed disclosing the purchase of depositary receipts until after the settlement and that Interstate was induced to settle by its reliance on the allegedly false testimony of Moore, Scheitel and Love. (JS 32-33, 82) In short, Interstate predicates its attempt to repudiate the settlement, including the releases, on the discovery in June of 1965 that Transcon purchased depositary receipts representing Queen stock. These assertions by Interstate are false. (1) Transcon did not delay disclosure of the purchase of the depositary receipts until after the settlement; disclosure was made two weeks before the settlement. (2) Interstate was not induced to settle by the testimony of Moore, Scheitel and Love; Interstate settled because it believed the District Court was about to enter summary judgment dismissing its complaint and because it regarded the $25,425 as a "substantial" amount. Mr. Burt did not first attempt to repudiate the release and settlement when he says he first learned of the falsity of the Moore, Scheitel and Love testimony; he had attempted to repudiate the settlement shortly after it was made, long before June 1965, on grounds wholly unrelated to the Moore, Scheitel and Love testimony. We deal separately with each of these false assertions of Interstate.

First: The Charge That Transcon Delayed Disclosure of the Purchase of the Deposit Receipts to the I.R.S. Until After Settlement of the North Carolina Suit. (JS pp. 32-

33, n. p. 33). The suit was settled on February 18, 1965. Queen's attorney with Transcon's consent wrote the I.R.S. setting forth the facts concerning the purchase of the depositary receipts on *February 4, 1965*. (R. 41-43). Disclosure of the purchase was, therefore, made two weeks *before* Interstate received its $25,425 and agreed to settle. Thus, Interstate's charge on page 33 (footnote) of the Jurisdictional Statement that " * * * disclosure was not made until Transcon believed that the Queen stockholders had purchased appellant's silence" is totally false.

Second: The Assertion That Interstate Was Induced to Settle by the Testimony of Moore, Scheitel and Love and That the Repudiation of the Release Was Based on the Discovery of the Alleged Falsity of That Testimony. The basic fact is that Interstate made the settlement because it was concerned about the imminent loss of defendant's summary judgment motion and because it then regarded the $25,425 as a "substantial" not a "nominal" amount, as it now claims.* These facts clearly appear from pages 2-3 of the letter Mr. Burt wrote to the Acting Secretary of the I.C.C. on February 2, 1965 (11a R. 55-9) and from pages 1-2 of the letter Mr. Burt wrote to District Judge Craven on February 4, 1965 (15a R. 55-10). These contemporaneous documents penned by Mr. Burt on the eve of the settlement unequivocally belie Interstate's current representation that the settlement was induced by the testimony of Messrs. Moore, Scheitel and Love.

Interstate would have it appear that after having been duped into the settlement on February 18, 1965, it did not challenge the settlement until it learned for the very first

* See footnote at JS 33.

time of the purchase of the depositary receipts by Transcon in the I.R.S. ruling of June 28, 1965. The settlement was hardly made before it was challenged by Mr. Burt on February 26, but clearly not, as Mr. Burt now claims, because of the alleged disclosures in the late filed Exhibit 168 (49a R. 53-Exh. 168), which did not come into existence until three months later. The fact is that Mr. Burt sought to repudiate the settlement long before he says he first learned of the purchase of the depositary receipts. Within weeks after receiving the $25,425 on February 18, 1965, Mr. Burt sought to repudiate the settlement that he had entered into on the incredible ground that he, as President and chief executive officer and principal stockholder of Interstate, had not been duly authorized by the Board to execute the settlement (69a R. 55-21, letter Interstate's secretary to Hunter Jones 4/9/65). This drew from his own attorney a letter to the other parties to the litigation asserting unequivocally that Mr. Burt had been duly authorized to settle the action and that the action had been duly and properly in all respects settled (45a R. 55-20, letter from Nicholson and Ledford to Jones, 3/11/65). All this took place in March and April of 1965, months before the time when Mr. Burt now tells us he first learned of the falsity of the Moore, Scheitel and Love testimony, that is after June ~~15,~~ 1965, when the time the I.R.S. issued its ruling (49a R. 53-Exh. 168).

Interstate's efforts to evade the consequence of its actions on February 18, 1965 do not stop with factual misrepresentations. At page 82 of the Jurisdictional Statement, Interstate asserts:

> " • • • The release in no way ran to, or released, the Interstate Commerce Commission or the United States which are the only parties defendant here. Transcon's

voluntary intervention waived whatever benefit they may claim from the release."

The point is not that the release did not run to the Commission or the United States; the point is that the settlement, including the releases, the agreement to terminate opposition to the Section 5 application, and the judgment with prejudice, operated to discharge the Queen stockholders and Queen of all possible liability to Interstate and thus to extinguish whatever interest Interstate may ever have had in Queen. The claim that Transcon's voluntary intervention in the District Court proceedings "waived" its right to challenge Interstate's standing is absurd. One of the principal grounds for Transcon's intervention was to challenge Interstate's standing, that is, to enforce against interstate the settlement which Interstate had voluntarily made on February 18, 1965.

The District Court was clearly correct in holding that Interstate's relief, if any, must be sought in the District Court for the Western District of North Carolina (A38), for the judgment dismissing with prejudice Interstate's contract claim is not subject to a collateral attack. *Restatement, Judgments,* § 11(b); *Bryan* v. *Kennett,* 113 U.S. 179 (1885); *Higginson* v. *Schoeneman,* 190 F. 2d 32 (D.C. Cir. 1951); *Hudson* v. *Lewis,* 188 F. 2d 679 (5th Cir. 1951); *Dowell* v. *Applegate,* 152 U.S. 327 (1894); *In re Cuddy,* 131 U.S. 280 (1889); *McCormick* v. *Sullivant,* 23 U.S. (10 Wheat.) 192 (1825); *Kempe's Lessee* v. *Kennedy,* 9 U.S. (5 Cranch) 173 (1809). Moreover, acceptance and retention of benefits of a settlement agreement with knowledge of facts rendering it voidable ratifies the contract and waives all rights to impeach it. *L. L. Brown Paper Co.* v. *Hydroiloid,* 118 F. 2d 674 (2nd Cir. 1941), *cert. denied,*

314 U.S. 653 (1941); *Eberhart Steel Products Co.* v. *United States,* 60 Ct. Cl. 912, *cert. denied,* 269 U.S. 571 (1925). If a party wishes to set aside or avoid a compromise agreement, he must, absent excuse, place the other party in *status quo* by returning or tendering back the consideration received. *Grymes* v. *Sanders,* 93 U.S. 55 (1876); *Vance* v. *Chicago Portrait Co.,* 19 F. 2d 981 (7th Cir. 1927), *cert. denied,* 275 U.S. 567. This Interstate has never done. The cases cited by Interstate at page 82 of its Jurisdictional Statement hold no more than that a release contract may be impeached only in a proceeding in which all parties to the release are present, which is not here the case.

Even if Interstate had not sold its interest for $25,425 cash, it would have no standing in the federal courts to challenge these administrative rulings. Standing before the I.C.C. is not the same as, nor does it confer, standing in a federal court to challenge a Commission order. *Sprunt & Son* v. *United States,* 281 U.S. 249 (1930); *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479 (1930); *Atchison, Topeka & Santa Fe* v. *United States,* 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd.* 350 U.S. 892 (1955). See *Seatrain Lines, Inc.* v. *United States,* 152 F. Supp. 619 (D. Del.), *aff'd. per curiam,* 355 U.S. 181 (1957).

Standing to challenge administrative orders turns on whether the Commission order provides or produces legal injury *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479 (1930); *Moffat Tunnel League* v. *United States,* 289 U.S. 113 (1933); *Edward Hines Trustees* v. *United States,* 263 U.S. 143 (1923) (A36). Accordingly, standing to challenge administrative orders in a regulated industry is granted to competing carriers or shippers affected by the order to protect their own economic self-interest. Such

standing does not exist where there is no existing interest to protect but merely an intent to enter the regulated industry. Note, *Competitors' Standing to Challenge Administrative Action under the A.P.A.*, 104 U.Pa. L. Rev. 843, 848-849, 853 (1956). *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479, 487, n. 7 (1930). See *Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295 (1940). Interstate does not fit this standard for it had no existence in 1964 as a competitor, shipper, or passenger of any bus company. Indeed, it never at any time owned a single bus or carried a single passenger. Further, even if Interstate were an existing carrier, the transaction it seeks to block is not one which creates new operating rights which might damage existing carriers. *Atchison, Topeka & Santa Fe Railway* v. *United States*, 130 F. Supp. 76 (E.D. Mo.), *aff'd.* 350 U.S. 892 (1955); *American Trucking Assns.* v. *United States*, 364 U.S. 1 (1960). Finally, the fact that Interstate wanted to buy into the industry and claims it was prevented from so doing by an alleged breach of the antitrust laws does not afford Interstate standing in a judicial proceeding to challenge these I.C.C. orders. It is settled that one who wishes to buy a business and alleges he was prevented from doing so has no cause of action under the antitrust laws, because he is not injured in his business. 15 U.S.C. § 15. *Martin* v. *Phillips Petroleum Co.*, 365 F. 2d 629 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1967); *Brownlee* v. *Malco Theaters*, 99 F. Supp. 312 (W.D. Ark. 1951).

Accordingly as Interstate has never had, and has never claimed to have had, any contact of any kind whatsoever with Virginia or Safeway, and as its sole contact with Queen—the alleged contractual expectancy—was terminated on February 18, 1965, it has no interest of any kind

which, under the foregoing cases, would afford it standing to challenge the judgment of the District Court. We, therefore, respectfully submit that the instant motion to dismiss the appeal for lack of standing should be granted.

POINT II

The District Court Properly Affirmed the Orders of the ICC, Which Properly Rejected Interstate's "Third Force" Claim and Were Based on Substantial Evidence That the Acquisitions of Control Were in the Public Interest.

Interstate would measure the legality of Transcon's acquisitions solely by the standard of the antitrust laws (JS 39-44, 57-64). Interstate's argument is that (a) under section 7 of the Clayton Act a duopoly is illegal (JS 40-44); (b) no antitrust immunity under Section 5 of the Interstate Commerce Act should be granted by the Commission because (i) the *McLean** doctrine should be overruled, or (ii) if *McLean* is followed, the Commission erred in concluding that the benefits to the public from the acquisitions overrode the alleged anti-competitive consequences of the resulting duopoly (JS 44-54); and (c) the Commission erred in failing to consider the desirability of a "third force" in the industry (JS 54-57). The argument is also made that the acquisition by Transcon of stock of Safeway and Virginia and of certain depositary receipts representing Queen stock prior to Commission approval violated Section 7 of the Clayton Act and therefore foreclosed Commission approval under Section 5 of the Interstate Commerce Act (JS 57-64).

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* *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944).

Interstate is making the very argument which this Court rejected in *McLean*: that the acquisition or consolidations, "• • • notwithstanding the Commission's approval, violates the [antitrust laws]; hence the Commission is without power to approve the merger" 321 U. S. at 77. But emphasis on the antitrust laws simply disregards the fact that the legality of combinations of common carriers is to be determined under section 5 of the Interstate Commerce Act and not the antitrust laws. (*id.* at pp. 77-79.) Under Section 5 the primary consideration is to ensure "adequate transportation service" (*id.* at p. 81), and "preservation of competition among carriers is significant chiefly as it aids in the attainment of the objectives of the national transportation policy" (*id.* at pp. 85, 86), that is, attainment of an "improved transportation service." (*id.*, at pp. 72, 88). It follows that in determining whether to approve a merger or acquisition under section 5, the Commission is not to consider whether the acquisition does or does not violate the antitrust laws (*id.*, p. 86). The Commission in acting under section 5 must ascertain the anti-competitive consequences of the proposed merger or acquisition and then decide whether the benefits to the public from the combination of carriers outweighs or overrides whatever anti-competitive consequences there may be (*id.*, at p. 87). And most certainly those anti-competitive consequences are not to be appraised by the standard of the antitrust laws. (*id.*, at p. 86).

This Court has repeatedly held that it is the wisdom of the Commission, not the courts, which must determine whether an acquisition is consistent with the public interest (*id.*, at pp. 87-88). And this Court has recognized that Congress left to the Commission the task of resolving the

conflict between antitrust considerations and public interest considerations arising from combinations of carriers in the motor carrier industry. (*id.*) The court's function is merely to determine whether there is substantial evidence to support the ultimate findings of the Commission. (*id.*, at pp. 88-90). Interstate asks that this Court overrule these long established, carefully considered principles* harmonizing the policies underlying section 5 and those underlying the antitrust laws in cases involving combinations of common carriers without, however, suggesting any reason or authority for so drastic a step.

The questions here are: was there substantial evidence to support the Commission's finding that (i) the proposed combinations would further the national transportation policy by benefiting the public through improved transportation facilities, (ii) the anti-competitive consequences of the proposed combination would be minimal and would be greatly outweighed by the strengthening of competition that would result from the consolidation, (iii) benefits to the public would override and outweigh whatever detriments there may be from any possible anti-competitive consequences the consolidation might have, and (iv) Interstate's contentions were without merit?

There can be no question that the Commission has carefully and properly performed its task under Section 5, as defined in *McLean, Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959); and *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965).

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* The *McLean* doctrine has recently been reviewed and reaffirmed in *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965) and in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959).

First: The Benefit to the Public

The Hearing Examiner specifically found that

> "the advantages to the public of through service in an enlarged territory, reduction of the imbalance in the flow of traffic, more effective utilization of equipment and facilities, improvements in safety programs, and substantial savings in operating costs are consistent with the public interest and 'will assist in effectuating the over-all transportation policy.'" (A122)

The Commission also found that centralized control of the various operations in Transcon would permit the establishment of more through service and improved service, all to the benefit of the public. (A101-102) These findings are very similar to those of the Commission in the *McLean* case, which were held by this Court to satisfy the "public interest" requirement of section 5(2). In *McLean* the Commission had found that the proposed consolidation would result in "improved transportation service, greater efficiency of operation and substantial operating economies (321 U. S. at 88), *e.g.* "Through movement of freight would be simplified and expedited, equipment would be utilized more efficiently, terminal facilities improved . . . and substantial operating economies would be achieved." (321 U. S. at 72).

There is clearly substantial evidence in the record to support these findings that the acquisition would result in improved transportation service. The evidence showed that common management and control by Transcon of the three carriers would (a) allow Transcon and the acquired carriers to institute, modify or delete through bus service in a manner which is responsive to public demand, and in a manner which is more competitive to Greyhound than was

previously possible (R. 53-Tr. 45, 46; 353-355; 402-403; 782, 783); (b) allow Transcon and the acquired carriers to operate through bus schedules, even though segments thereof are unprofitable. Formerly, the carrier owning the unprofitable segment would often refuse to participate (R. 53-Tr. 431; 670-672). This was one of the primary competitive weaknesses in the Trailways System of separately owned carriers in attempting to meet Greyhound's competition effectively (R. 53-Tr. 403); (c) eliminate duplications in advertising, releasing the savings to be used in additional advertising (R. 53-Tr. 46, 47; 782, 783; 891, 892); (d) through Transcon's financial backing enable the acquired carriers to build new terminals and modernize old ones to an extent not previously possible (R. 53-Tr. 435-437; 891); (e) consolidate duplicate machine accounting operations located at Washington, D. C., Charlottesville, Va. and Charlotte, N. C. producing an annual savings of $75,000 to $100,000 (R. 53-Tr. 48; 390; 400; 599, 600); (f) enable the acquired carriers, through the mass purchasing ability of Transcon to achieve substantial annual savings on the purchase of everything from bus tickets and baggage claim checks to diesel engines (R. 53-Tr. 47; 389; 783; 463-465; 598-599; 891); (g) achieve a one time reduction of inventory of vehicle spare parts of $1,000,000 (R. 53-Tr. 599); (h) result in an increased equipment utilization which, in turn, would allow the over-all size of the fleet of each of the acquired carriers to be trimmed (R. 53-Tr. 47, 48; 783); (i) result in traffic improvement for Transcon's western segment (R. 53-Tr. 46); (j) result in savings by the elimination of certain common facilities (R. 53-Tr. 48); (k) make available to the entire system additional personnel (R. 53-Tr. 47; 400); (l) strengthen the financial position of all the companies involved (R. 53-Tr. 47; R. 53-Exhs. 19, 20, 21, 24, 25,

26); (m) achieve uniformity in equipment and service (R. 53-Tr. 387-389); (n) effect savings through use of Transcon's self-insurance program (R. 53-Tr. 402); and (o) upgrade the safety program of the acquired companies (R. 53-Tr. 402).

In the face of this evidence there is simply no basis at all for Interstate's assertion that the record " * * * is even deficient in * * * evidence relating to expected economies and savings resulting from the proposed acquisitions." (JS 20) The Commission did not have to find to authorize the acquisitions, as Interstate contends at pp. 19 and 20, that the acquired companies were not providing adequate service, or that the acquired companies were in "poor financial condition", or that acquisitions were "required" to preserve the status of the acquired companies. (JS 19) The Act, contrary to Interstate's assertions, is "to be administered with an eye to improving transportation facilities, not merely to preserving existing arrangements or competitive practices." *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86 (1944).

Second: The Impact on Competition.

The Commission focused squarely on the question of the extent to which the proposed acquisitions would affect competition. It found:

> "Here, the proposed transactions will not result in a reduction of competition, but will substantially increase competition, which factor is pointed out in the report of the examiner. While there (546) is some duplication in operations of Transcon and the carriers involved in the proceedings herein, essentially between Washington, D.C., and Baltimore, Md., Philadelphia,

Pa. and New York, N.Y., and to some extent between Tenn T and CT in Tennessee comprising, at most, some 350 miles of a total of 10,860 miles operated by the carriers to be controlled, or about 3.5 percent, there is virtually no duplication in service provided." (A64-A65)

The record evidence amply supports this finding.

The acquired carriers did not compete with themselves, or with Transcon. They stood to each other and to Transcon in an end-to-end, not parallel or duplicative, relationship. The competition was with Greyhound's parallel service. Trailways of New England (T.N.E.), a subsidiary of Safeway and Virginia, operated from Portland, Maine to New York City, N.Y. via Boston, Mass. (R. 53-Exhs. 39, 92, 94). It had Greyhound competition over all its major routes. (R. 53-Exh. 95, R. 53-Tr. 722) Transcon had no routes in the area, but connected with it at New York City, N.Y. (R. 53-Exhs. 1; 39). Safeway operated from New York City, N.Y. to Washington, D.C. through Baltimore, Md. (R. 53-Exhs. 39, 86) It had Greyhound competition over all of its major routes.* (R. 53-Exh. 88, R. 53-Tr. 607) Transcon's route paralleled that of Safeway between Philadelphia and New York, but the operations were entirely different because Transcon was restricted on that route to long haul traffic, either originating or destined to Harrisburg, Pa. or points west thereof. (R. 53-Tr. 331, 332) Virginia operated from Washington, D.C. to Durham, N.C. and west to Cincinnati, Ohio. (R. 53-Exhs. 39, 46, 47) It had Greyhound competition over all its major routes. (R. 53-Exh. 49, R. 53-Tr. 509, 510)

* Between Washington and New York both Safeway and Greyhound operate 48 scheduled trips per days in each direction (R. 53-Tr. 607).

Transcon had no routes in the area served by Virginia but connected with it at Washington, D.C. (R. 53-Exhs. 1, 39). Queen and its various partially and wholly owned subsidiaries operated extensive local routes in North and South Carolina and Georgia, extending west to Nashville, Tenn. and south to Lake City, Fla. (R. 53-Exhs. 39, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117). These companies had Greyhound competition between all major points served. (R. 53-Exhs. 126, 127, R. 53-Tr. 1042-1045) Transcon had no routes in the area served by Queen except between Nashville and Knoxville, Tenn. (R. 53-Exh. 39) The actual route duplication was between Sparta and Knoxville and was approximately 100 miles (R. 53-Tr. 344). It connected with these companies at Nashville, Knoxville and Chattanooga, Tenn., and at Atlanta, Georgia (R. 53-Exh. 39).

Interstate's contention that the acquisitions would eliminate competition between the existing Transcon route from Dallas to New York via St. Louis and a southeastern route from Dallas to New York via Atlanta is contrary to fact. The record shows that there was no competition between these two routes, for there was not a single schedule in effect for through service from New York to Dallas via Atlanta (R. 53-Exh. 48). The closest any one of the acquired carriers came to Dallas is Nashville, Tenn., some 700 miles east of Dallas. Transcon and the acquired carriers were not operating a single through bus schedule between New York and Dallas over the routes of the acquired carriers in 1964 (R. 53-Exh. 48). Transcon was operating four schedules per day over its St. Louis route. (R. 53-Tr. 560) One of the benefits of the merger is the establishment for the first time of an efficient through service from New York to Dallas via Atlanta, served by the many feeder lines of

the three acquired carriers through the southeastern part of the United States.

Thus, the evidence demonstrates beyond question that the acquisitions would, because of the end-to-end relation of the acquired carriers to each other and to Transcon, have an absolutely minimal adverse impact on competition. But the Commission's appraisal of the competitive impact of the acquisitions did not rest on this finding alone. It also considered the impact of the acquisitions on competition with Greyhound, whose routes parallel those of the three carriers and Transcon, and which the Examiner described as "the sole real competitor of Transcon and the subject carriers" (A116). The Examiner found:

> "The variety of financial and operating data discussed in detail earlier herein is convincing that Greyhound is the dominant (25) for-hire motor-bus carrier of passengers on the national scene. Approval of the transactions would extend Transcon's operations, through the subject carriers, into the northeastern seaboard and would intensify, not create, competition there and in other areas of the country. Compare Greyhound Corp.—Control—Florida Motor Lines Corp., supra. There is little likelihood that Greyhound's operations would be jeopardized thereby." (A118)

The Commission pointed out that "the proposed transactions will not result in a reduction of competition, but will substantially increase competition, which fact is pointed out in the report of the examiner." (A64)

The Commission's conclusion that the acquisitions would materially increase and strengthen competition with Greyhound in the areas served by the three carriers, rests on

substantial evidence. Not only do the routes parallel Greyhound, but the vesting of control of the three carriers in Transcon will achieve greater efficiency and enable the establishment of through routes with greatly improved through service. The through schedules and the long haul traffic they produce, have become the "lifeblood" of all intercity bus carriers. (R. 53-Tr. 346-347) As an example, 85% of Virginia's equipment is operated in these through bus schedules (R. 53-Tr. 429). Even Interstate's witnesses conceded that "you could get much better efficiency in one big operating unit than you can in 10 smaller ones, no matter how closely they tried to operate." (A125). And there was substantial evidence of the inability of the three carriers to coordinate their schedules so as to provide effective competition to Greyhound. For example, there was no through service via Atlanta from New York to Dallas. Such a schedule did not exist in 1964 because certain segments would operate at a loss unacceptable to the carrier operating that segment. The mere fact that the carriers were members of Trailways did not ensure establishment and coordination of through services. A through service requires agreement as to the number of buses, type of equipment, number of bus miles to be purchased by each carrier not contributing equipment to the pool, and most important, time schedules over segments of the through routes. (R. 53-Tr. 89, 32, 33). The evidence showed it was often difficult, if not impossible, to reach agreement because one segment of the route proved unprofitable for the carrier operating on that segment. (R. 53-Tr. 403, 1148, 1149, 672.) The Examiner took specific note of this problem at A101.

Third: The Appraisal of the Competitive Impact and the Public Benefit of the Acquisitions.

The Commission decided that the public interest would benefit to a greater extent from strengthening the weaker arm of the existing duopoly in the industry to better enable it to compete with Greyhound, than from the continuance of the status quo with Transcon and the three carriers at a material competitive disadvantage with Greyhound. (A65).

This Commission decision is in accordance with a long standing policy of the Commission to develop and strengthen competition to Greyhound in the intercity bus industry. The policy of the Commission goes back to the very inception of its functions under the Motor Carrier Act of 1935. At that time, Greyhound was already well entrenched in the bus industry (R. 53-Tr. 1202-1203). The National Trailways Bus System (Trailways) was organized the year after the Motor Carrier Act was enacted. It was formed as a non-profit trade association by five railroad owned bus lines (R. 53-Tr. 24-25; 669) for the primary purpose, as the Examiner indicated, of fostering competition with "Greyhound's nationwide motorbus operations" (A80; R. 53-Tr. 670). To create a uniform public image, its members adopted "Trailways" as a common trade name; adopted uniform paint schemes and bus markings; established joint terminals; and attempted to coordinate advertising, purchasing and other essential functions (R. 53-Tr. 24-32; 1149). The Commission's policy of fostering and strengthening competition as against Greyhound has been manifest in many decisions over a long period of time.

The Commission decided numerous cases adverse to Greyhound and favorable to Trailways carriers, based

on the need to strengthen Trailways as a competitor of Greyhound. This was done in view of the fact that the voluntary trade association, Trailways, was the only semblance of competition which existed. In each instance, the need to strengthen the Trailways system was cited. These cases took the form of so-called "bridge the gap" applications based on the need of individual Trailways carriers to reach termini at which other friendly Trailways carriers could provide an outlet, other than Greyhound, for its traffic. Even the railroad owned and supported carriers that originally formed Trailways in 1936 had no other way to compete with Greyhound for the vital long haul traffic.

As stated by the Commission in *Mt. Hood Stages-Extension-Salt Lake City,* 44 M.C.C. 535, 548:

> "Extension by applicant to Salt Lake City will enable Trailways members to reach, over lines of their own system, a territory thus far closed to them except through a competitive outlet [Greyhound] from which they have not had in the past, and cannot in the future expect a comparable interchange in the reverse direction."

During that period, the Commission granted numerous other applications on the grounds that approval would strengthen Trailways carriers in competition with Greyhound. See, e.g., *Bowen Motor Coaches-Extension-Tucumcari,* Docket No. MC-9259 (not printed); *Missouri Pacific Transportation Co., Extension of Operations,* 22 M.C.C. 321; *I and S Trailways, Inc., Extension-Knoxville, Tenn.,* 49 M.C.C. 872; *West Coast Bus Lines Common Carrier Application,* 32 M.C.C. 692; *West Coast Bus Lines, Extension of Operations-Stockton,* 48 M.C.C. 177; *Joel*

W. Wright et al.-Control-Queen City Coach Company and Smoky Mountain Stages, Inc.-Control-Georgia Florida Coaches, Inc., 50 M.C.C. 325.

Transcon was created in 1948, by an amalgamation of the operating rights and property of the Santa Fe Trail Transportation Company, Dixie Motor Coach Corporation and Continental Bus System, all Trailways carriers. In *A. C. Allyn and Co., et al.-Control; Transcontinental Bus System, Inc.-Control-Continental Bus System, Inc., et al.*, 50 M.C.C. 193 (1948), the Commission approved that amalgamation thus creating the nucleus which was over a period of time to grow into Greyhound's only national competitor.

Its growth up to and including the instant transactions has been wholly through the acquisition of other Trailways carriers sanctioned by the Commission because, e.g.:

> "Approval of the transaction would make available a more complete, efficient, and co-ordinated transcontinental bus service. * * * The service that would result as between the carriers would benefit both applicants and would make possible more effective competition by them as well as other Trailways members with the Greyhound system." *Transcontinental Bus System, Inc.-Control-American Buslines, Inc.*, 59 M.C.C. 233, 248. To the same effect see, e.g., *West Coast Bus Lines, Ltd.*, 50 M.C.C. 525 (1948); *Rio Grande Motor Way, Inc.*, 55 M.C.C. 31, 235, 58 M.C.C. 801 (1952); *Denver-Colorado Springs-Pueblo Motorway, Inc.*, 55 M.C.C. 31, 235, 58 M.C.C. 801 (1952); *Southern Bus Lines, Inc.*, 56 M.C.C. 803 (1949); *Valley Transit Lines*, 58 M.C.C. 805 (1952); *Rio Grande Motor Way, Inc.*, 59 M.C.C. 233 (1952); *Crescent Stages, Inc.*, 59 M.C.C. 491 (1953); *Central Bus Lines, Inc.*, 59 M.C.C. 805 (1953); *Smoky*

Mountain Stages, 70 M.C.C. 77 (1956); *Union Bus Lines, Inc., and Randolph Field Bus Company, Inc.,* 65 M.C.C. 803 (1956); *Bayshore Buslines, Inc.,* 65 M.C.C. 805 (1955); *Arkansas Motor Coaches, Ltd., Inc.,* 70 M.C.C. 809 (1956); *Midwest Buslines, Inc.* (Not Printed) (1960); *Tennessee Trailways, Inc.,* 87 M.C.C. 775 (1961).

All the above acquisitions by Transcon were of Trailways carriers, forging a real competitor for Greyhound by common ownership through Transcon of important segments of Trailways. In every case the Commission found that unity under Transcon would enhance the ability of the previously separate parts of Trailways to better compete with Greyhound.

While allowing Transcon to weld together the first and only semi-national competitor for Greyhound, the Commission, after 1948, continued its policy of strengthening other parts of the Trailways System.

In *Capitol Bus Company, Extension-Elmira-Wilkes-Barre,* 83 M.C.C. 559, the Commission stated:

> "If we were to deny Applicant the right to close the gap in its operations between Wilkes-Barre and Towanda, we would, as we said in an earlier case, 'merely be hampering the development of a competing system of transportation [Trailways] for the sake of protecting a single carrier from some diversion of traffic [Greyhound].'"

See also, e.g., *Capital Bus Company, Extension-Washington, D.C.,* 69 M.C.C. 447; *Tamiami Trail Tours, Inc.-Extension-Jacksonville-Canal Point, Fla.,* 84 M.C.C. 703;

Carolina Coach Company-Control and Merger-Norfolk Southern Bus Corp., 59 M.C.C. 681; *Safeway Trails, Inc.-Control and Merger-Quaker City Bus Co.*, 70 M.C.C. 377; *Safeway Trails, Inc. and Virginia Stage Lines-Control-Trailways of New England, Inc.*, 75 M.C.C. 179.

In the meantime the Commission has denied numerous applications by Greyhound on the grounds that approval would lessen the ability of Trailways carriers to compete with it. See, e.g., *Southwestern Greyhound Lines, Inc.-Merger-Arkansas Motor Coaches*, 39 M.C.C. 721; *Illinois Greyhound Lines, Inc.-Purchase-Southern, Ltd.*, 38 M.C.C. 641; *Southeastern Greyhound Lines-Control-Lewisburg Bus Lines, Inc., Georgia Stages, Inc., Crescent Stages, Inc.*, 40 M.C.C. 375, 45 M.C.C. 185; *Southwestern Greyhound Lines, Inc.-Extension-Lower Rio Grand Valley*, Docket No. MC-1510 (Sub. No. 59), noted at 78 M.C.C. 805; *Greyhound Lines, Inc.-Extension-Lincoln, Nebraska*, 99 M.C.C. 299; *The Greyhound Corporation-Control, Pacific Greyhound Lines-Control and Merger-Geronimo Lines, Inc.*, 56 M.C.C. 415.

The Commission did not create Greyhound, it inherited it. In 1935, the basic segments of the Greyhound system were already in place through varying degrees of stock ownership by The Greyhound Corp. Many Commission decisions since that time have merely allowed Greyhound to merge with its subsidiaries to provide more efficient operations or to buy additional shares in partially owned subsidiaries. See, e.g., *Central Greyhound Lines, Inc., Northland Greyhound Lines*, 25 M.C.C. 59 (1939); *Canadian Greyhound Lines, Ltd., and Toronto Greyhound Lines, Ltd.*, 35 M.C.C. 599 (1940); *Teche Greyhound Lines*, 36 M.C.C. 397 (1941); *Taho Greyhound Lines*, 37 M.C.C.

654 (1941); *Florida Greyhound Lines,* 40 M.C.C. 802 (1945); *Southern Kansas Greyhound Lines,* 45 M.C.C. 679 (1947); *Northeastern Missouri Greyhound Lines,* 50 M.C.C. 441 (1948); *Central Greyhound Lines, Great Lakes Greyhound Lines, Illinois Greyhound Lines, Ohio Greyhound Lines,* 55 M.C.C. 237 (1948); *Dixie Greyhound Lines, Florida Greyhound Lines, Northwest Greyhound Lines, and North Coast Greyhound Lines,* 56 M.C.C. 238 (1949); *Southeastern Greyhound Lines,* 57 M.C.C. 123 (1950); *Southeastern Greyhound Lines of Indiana,* 57 M.C.C. 808 (1951); *Pennsylvania Greyhound Lines, Pennsylvania Greyhound Lines of Virginia and Pennsylvania Greyhound Lines of Indiana,* 60 M.C.C. 803 (1954); *Capital Greyhound Lines,* 60 M.C.C. 804 (1954); *New England Greyhound Lines, Inc.,* 60 M.C.C. 804 (1954); *Capital Greyhound Lines,* 65 M.C.C. 809 (1955); *Central Greyhound Lines of New York,* 65 M.C.C. 810 (1955); *Northland Greyhound Lines,* 65 M.C.C. 816 (1956); *Pacific Greyhound Lines,* 70 M.C.C. 59 (1956); *Eastern Canadian Greyhound Lines, Ltd.,* 70 M.C.C. 806 (1957); *Southwestern Greyhound Lines,* 75 M.C.C. 339 (1958); *Northeastern Missouri Greyhound Lines,* 75 M.C.C. 339 (1958); *Atlantic Greyhound Corporation,* 80 M.C.C. 802 (1959); and *The Greyhound Lines, Inc.,* 93 M.C.C. 392 (1963).

In other acquisitions approved by the Commission for Greyhound, the competitive impact on Trailways carriers was closely considered, and protective conditions imposed when warranted. Recently, at the request of a Trailways carrier a number of those applications were reopened, and it was held by the Commission that Greyhound had not lived up to its original commitments before the Commission to protect the Trailways carrier. The Commission ordered Greyhound to live up to the pledges made in these cases

some years before or forfeit the certificates thereby gained. *Mt. Hood Stages, Inc., Petition for Modification-Greyhound Mergers,* Docket No. MC-F-9136 (1968).

Despite Commission policy which had fostered the growth of Trailways and Transcon, Greyhound was in 1964 the only intercity bus carrier operating on a national basis. The respective posture of Greyhound and Transcon in the year Transcon sought Commission approval of the acquisition of Virginia, Safeway and Queen was as follows. In 1964, Greyhound dominated the industry, generating $258,954,000 or 63% of its total passenger revenues as opposed to Transcon and subsidiaries, generating only $46,726,000 or slightly over 11% of those revenues. (R. 53-Exh. 74). Greyhound in 1964 held certificates to operate over 92,000 route miles (R. 53-Tr. 1205), owned over 5,000 buses (R. 53-Exh. 156), and had 24,000 employees. (R. 53-Exh. 155). In 1963, Greyhound aggregated 447 million bus miles (R. 53-Exh. 74) and over 10 billion passenger miles. (R. 53-Exh. 156). Greyhound's routes are spread throughout the continental limits of the United States. (R. 53-Exh. 147). In 1964, Transcon, Greyhound's only major rival, operated in only 32 states plus the District of Columbia. (R. 53-Exhs. 1, 39). Of those 32 states, 10 had little route coverage.* Transcon had no routes at all in 14 states,** which included the entire east coast. (R. 53-Exhs. 1, 39). In all it had 45,575 route miles. (R. 53-Exh. 148). In 1963, it operated 97 million bus miles. (R. 53-Exh. 74). In terms of revenues, Transcon was 18% the size of Grey-

* Indiana, Kentucky, Michigan, Montana, New York, Ohio, Oregon, Pennsylvania, South Dakota, and Washington.

** Connecticut, Delaware, Florida, Idaho, Maine, Minnesota, New Hampshire, North Carolina, North Dakota, South Carolina, Vermont, Virginia, West Virginia, and Wisconsin.

hound; in terms of bus miles operated, it was 21.5% the size of Greyhound.

At the time of these transactions, Transcon's biggest single deficiency which kept it from being Greyhound's only national competitor, was the fact that it had no operations whatsoever from Maine to Florida on the populous east coast except for one long haul route through Pennsylvania into New York City. (R. 53-Exhs. 1, 39).

In the Commission's judgment, authorization of the acquisitions would diminish Greyhound's monopoly position. (A64-66). As the Examiner found, "a duopoly would supplant a monopoly in intercity passenger transportation" (A122). The Commission's decision, based on substantial evidence, was that the acquisitions would improve transportation and would implement the Commission's long standing policy of strengthening competition against Greyhound.

The instant acquisition achieves the dual objectives of the national policy as reflected in Section 5 of the Interstate Commerce Act and in the Motor Carrier Act of 1935: improved transportation service without diminution of competition. There can be no question that for the reasons set forth above at pages 18 to 25, there was substantial evidence to support the Commission's decision. Accordingly, the wisdom of the decision is not for this Court to review. "[I]t is not for the courts to weigh the evidence introduced before the Commission." *Assigned Car* cases, 274 U.S. 564, 580 (1927). In passing on orders of the Commission, the courts " * * * may not substitute our judgment or discretion for that of the Commission on questions of credibility, weight of evidence, and inferences to be drawn from the

facts deemed proven." *William N. Feinstein & Co.* v. *U.S.*, 209 F. Supp. 613 (S.D.N.Y. 1962) (single judge), *aff'd*, 317 F. 2d 509 (2d Cir. 1963).

Fourth: Interstate's Claim That the Commission Has Created a Duopoly and Thereby Foreclosed the Creation of a "Third Force" in the Intercity Bus Industry.

Throughout Interstate's brief, there are repeated references to the creation of a so-called "third force" in the bus industry. Interstate says it would consist of Queen, Tamiami Trails, Carolina Coaches, Virginia and Safeway and their subsidiaries. The use by Interstate of the label "third force" is highly misleading, for a combination of Queen, Virginia and Safeway would not create a "force" at all, at least not a force which would have any competitive impact on the operations of either Greyhound or Transcon. Its operations would not be national in character, but would be limited to the eastern seaboard. It would be wholly dependent on either Greyhound or Transcon for an outlet for the west bound traffic it generated and to receive vital revenues for the transportation of east bound traffic generated by Greyhound or Transcon. Greyhound having complete routes on the eastern seaboard and Transcon having none, it follows that only Transcon would feed it east bound traffic, making that new unit and Transcon wholly dependent on each other for east-west traffic in the same fashion that Transcon, Safeway, Virginia and Queen were already dependent on each other. Thus, the form would have changed while the substance remained the same. The public would still be deprived of the many benefits which the Commission found would flow from the amalgamation of these already dependent natural allies.

As we have seen, a combination of these three carriers would not under any circumstances compete with Transcon. And such a combination could be at a distinct disadvantage because of its regional character and limited size in competing with Greyhound. Thus, the so-called "third force" is a wholly illusory concept.

Interstate's arguments about the "third force" merely raise in a different form the question of whether the public interest in improved transportation would be better served by permitting Transcon to control Queen, Safeway and Virginia thereby enabling them to better compete with Greyhound, or, by continuing the status quo, foregoing the improvements in service inherent in control in Transcon, and continuing with Transcon and the three carriers at a decisive competitive disadvantage to Greyhound. The Commission faced this question squarely. (A65-66). It chose the first alternative on the basis of evidence in the record that would literally permit no other choice. As we have seen, the Commission concluded that a viable duopoly which would increase competition with Greyhound was preferable to the continuance of the status quo, with Transcon and the three carriers at a material disadvantage as against Greyhound.

Interstate's charge that the Commission failed to hear evidence or argument on the "third force" is just not true. One-hundred and twenty-five pages of the record (10% of the total) were devoted to evidence adduced by Interstate on direct and cross-examination respecting the so-called "third force." Mr. Burt cross-examined Strayhorn (R. 53-Tr. 367-378), Jessup (R. 53-Tr. 437-443), Trice (R. 53-Tr. 560-568), Walsh (R. 53-Tr. 612-628), Browning (R. 53-Tr. 733-766), Moore (R. 53-Tr. 973-979) and Quattle-

baum (R. 53-Tr. 1069-1097) relative to the "third force." He presented his own witness Rempe in addition (R. 53-Tr. 1164-1198).

What the Commission did refuse to consider was evidence of a third force *under Interstate's control* (A65). In refusing to go into this, the Commission was entirely correct, for Interstate had failed to file an application for control of any of the three carriers (A65). Section 5(2) requires the filing of an application for authority to acquire control of a carrier as a condition to the Commission's consideration. *Canadian Pacific Ry. Co.* v. *United States,* 158 F. Supp. 248 (D. Minn. 1958). Control applications may be and have been filed in the absence of a contract to acquire control. *See,* e.g., *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959); *Canadian Pacific Ry. Co.* v. *United States of America* (*supra*). In the absence of an application by Interstate to acquire control of Queen, the Commission was under no duty to consider the impact of a "third force" which it claims "it would create." (A65) Indeed, the Commission would have been without power to adjudicate or determine, in the absence of an application by Interstate, whether Interstate's creation of a "third force" would be in the public interest. *See,* e.g., *Canadian Pacific Railway Co., supra.*

There is a further fallacy in Interstate's "third force" argument, i.e., the claim that Queen was the key link in the "third force". This is simply not the fact. Queen can be, and on some through bus schedules, is by-passed on the north-south routes of Carolina Coach Company, Carolina Scenic Stages, Service Trailways, Tamiami Trailways and Smoky Mountain Stages. (R. 53-Exh. 87—Runs 6-9) Queen can be and is by-passed on northeast-southwest movements

on the routes of Tennessee Trailways and various of the Continental companies. (R. 53-Exh. 87—Runs 12-14) Obviously if Queen* were the key, Transcon would not, as it did, contract to purchase both Safeway and Virginia before it had any commitment from the Queen shareholders to sell Queen. And Transcon was obligated, subject only to Commission approval, to acquire Virginia and Safeway regardless of what happened to Queen.

Fifth: Interstate's Claim That Transcon's Pre-Approval Acquisitions Barred the Commission From Approving the Acquisition of Queen Under Section 5.

At pages 57 through 64 of its Jurisdictional Statement, Interstate makes the argument that the purchase prior to Commission approval by Transcon or its subsidiaries of 21% of the stock of Safeway, 4% of the stock of Virginia and depositary receipts representing 10%** of Queen stock coupled with the escrow arrangements covering the stock of Safeway, Queen and Virginia pending Commission approval precluded the Commission from approving Transcon's applications under Section 5 of the Interstate Commerce Act. Interstate's argument is based, (1) on the claim that the pre-approval purchases and the escrow arrangements violated Section 7 of the Clayton Act and, (2) because of the violation of Section 7 of the Clayton Act, the Commission could not approve the acquisitions under Section 5 of the Interstate Commerce Act. There is no substance to either of these points..

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* Queen had an interest in Carolina Scenic, Smoky Mountain Stages and Tennessee Trailways which did not amount to control in any instance.

** Actually, the depositary receipts bought by Transcon amounted to receipts representing slightly over 9% of Queen's shares.

(1) Neither the acquisition of stock in Safeway or Virginia, the acquisition of Queen depositary receipts, nor the escrow arrangements violated Section 7 of the Clayton Act for none of these steps in any way lessened or tended to lessen competition. Acquisition of minority interests in these three companies (21% of Safeway, 4% of Virginia and 9% of Queen) did not carry with it either control in the companies or a voice in their management. All three companies were closely held and thus such minority holdings would not, of themselves, constitute control. The Commission so found. (A60). During the escrow period, pending Commission approval, Transcon had no representation on the Board of Directors in any of the three companies (R. 53-Exh. B in Application, Docket No. MC-F-8744; Exh. B, bb in Application, Docket No. MC-F-8774, pp. 6, 7). Here the operation of the three companies continued during the pendency of the escrow arrangement independently of Transcon. For example, Safeway, Queen and Virginia retained control of their terminals (R. 53-Tr. 362, 363, 365); there was no amalgamation of administrative services of Transcon, Safeway and Virginia in such matters as maintenance, purchasing, advertising etc.; Safeway, Virginia and Queen each maintained its own garage facilities (R. 53-Tr. 595-597; 456-459; 1063); Virginia and Safeway maintained different purchasing operations from Queen (R. 53-Tr. 598, 1063) and separate advertising (R. 53-Tr. 782-783). Each operated its own accounting system (R. 53-Tr. 599-601). And as we have seen, even had there been an amalgamation in their operations under Transcon's control during the escrow period, there would have been no lessening of competition because of the end-to-end relationship of the three carriers with each other and with Transcon.

The only effect of the escrow arrangement was to subject each share of Queen stock through the medium of the depositary receipts to the terms of the contract of sale. It had no effect whatsoever on the operations of the companies. And it did not in any way give Transcon control or a voice in their management. Accordingly, there simply is no basis whatsoever for contending that the escrow arrangement or Transcon's acquisition of minority stock interests in the three companies violated Section 7 of the Clayton Act. This of itself is sufficient to distinguish *Denver and Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485 (1967), where this Court concluded that acquisition by Greyhound of 500,000 shares (ca. 20%) of Railway Express would carry with it a likelihood of a lessening of competition.

(2) In any event, the measure of the legality of the pre-approval acquisitions and the escrow arrangements is not Section 7 of the Clayton Act, but rather, Section 5 of the Interstate Commerce Act. In this case, unlike *Denver and Rio Grande,* Transcon's applications are expressly premised on section 5 as well as section 20. Thus, as this Court held in *Denver and Rio Grande,* the Commission must consider the anti-competitive impact, if any, of the proposed consolidations. This, as we have pointed out at pages 21 to 25 above, the Commission has carefully done. There is simply no support whatsoever under *Denver and Rio Grande* or in any other case for Interstate's novel contention that Section 7 of the Clayton Act should displace Section 5 of the Interstate Commerce Act as the measure of the validity of a proposed consolidation among motor carriers subject to Commission approval.

POINT III

The District Court Correctly Held That the I.C.C. Orders Were Not Procured by Fraud.

In numerous instances Interstate charged before the I.C.C. that the testimony of Transcon's President, Mr. Moore, its Financial Vice President, Mr. Scheitel, and Queen's President and shareholder, Mr. Love, was false. These charges were also made in the three-judge district court below, and are repeated here in Interstate's jurisdictional statement.

The essence of Interstate's claim is: (1) that at the time of its May 16, 1964 contract to purchase all shares of Queen, Transcon secretly agreed with one or more Queen shareholders to purchase for cash a number of their Queen depositary receipts, (2) that such an agreement to pay cash deprives the acquisition of its tax-free nature as a "Type B" reorganization and would, if known to the Internal Revenue Service, result in the imposition of a capital gains tax on all Queen shareholders, (3) that the actual purchase of such receipts by Highway, a Transcon subsidiary, constituted the acquisition of control of Queen by Transcon prior to I.C.C. approval in violation of Interstate Commerce Act § 5(4) and in violation of Clayton Act § 7, and (4) that Messrs. Scheitel, Love and Moore, among numerous others, conspired to withhold knowledge of both the alleged secret agreement and the actual purchases from the I.C.C. by committing perjury at the hearings before the I.C.C.

Plaintiff's claims with respect to secret agreement, prior unauthorized acquisition of control, and fraud committed

to conceal these matters, are completely unsupported by any evidence, and are contradicted by substantial evidence that was credited by the hearing examiner, the Commission, and the District Court.

A. *There Was No Evidence of a Secret Agreement to Pay Cash*

In support of its claim of a secret agreement by Transcon to pay cash for Queen shares or depositary receipts, Interstate relies heavily on an April 28, 1964 letter from Mr. Love, the President of Queen, to Mr. Moore, the President of Transcon. This letter contained a proposed contract under which Transcon would exchange eight of its own shares for each share of Queen and for each share of GRIC (R. 53-Exh. 103). The letter states:

> "Some of our stockholders wanted a minimum guaranty of cash and I enclose an offer by Transcontinental to buy back this stock at $31.25 per share. This is an integral part of our offer to sell the stock of Queen and General Realty and if it is not accepted the offer contained in the signed Contracts is withdrawn."

The letter notes that a condition of the proposed contract is that a satisfactory employment contract be worked out, and the letter also expresses the need for an exchange of stock of Eastern Carolina Corporation and a purchase contract with Transportation Supply Corporation. The proposed contract would require the Queen shares to be held by a bank in escrow until consummation of the transaction after I.C.C. approval, but would make no provision for the issuance by the escrowee bank of depositary receipts for such shares.

As the District Court properly noted (A12) the testimony was clear that the April 28, 1964 offer was rejected by Transcon (R. 53-Tr. 848) and that the final purchase agreement dated May 16, 1964 did not include any buy-back arrangement (R. 53-Exhs. 14-15). The contract actually entered into as of May 16, 1964 differs materially from the April 28, 1964 proposal, in that the exchange ratio is 7.25 to 1, instead of 8 to 1 (sec. 1.1), in that transferable depositary receipts are to be issued for Queen shares by the bank (secs. 2 and 4), and in that no Transcon shares are to be delivered by Transcon to the bank until after the I.C.C. approval has been obtained (sec. 6.1(b)).

Interstate's argument that there was a secret agreement to pay cash rests largely on the inference it seeks to draw (at JS 11-13) from the fact that each of the other three requirements mentioned in the April 28, 1964 letter was fulfilled, in whole or in part, by resolutions passed at the May 21, 1964 meeting of Queen's Board (R. 53-Exh. 101). The fact is that the fourth requirement, the desire of one or more shareholders for cash was also raised, and disposed of in a proper manner, at the May 21, 1964 Queen Board meeting, the minutes of which recite:

> "L. A. Love then announced that Mrs. Margie Rowland desired to sell the stock owned by her family for $250.00 cash. James A. Hardison, Jr. indicated a willingness to purchase Mrs. Rowland's stock." (R. 53-Exh. 101).

Presumably Mrs. Rowland was satisfied that her stock could probably be sold for at least $250 per share cash. The fact is that Transcon subsequently bought her depositary receipts for $290 per share. If there had been a secret agreement by Transcon to buy Queen City stock at $290, obvi-

ously Mrs. Rowland would not have desired to sell the shares for $250. Equally obviously, Transcon would not have paid $290 for Mrs. Rowland's stock if there had been an agreement to purchase at $250, as Interstate contends at pages 11-13 of its Jurisdictional Statement.

Since the actual May 16, 1964 contract, unlike the April 28, 1964 proposal, gave the shareholders marketable depositary receipts, there was, moreover, no need for a side agreement guaranteeing a minimum cash price. As Mr. Scheitel testified:

> "The depositary receipts were issued on the basis that they were marketable, and if they could find find a market, fine". (R. 53-Tr. 200).

Mr. Scheitel went on to testify that Transcon had suggested to Queen shareholders the possibility that if they wanted to sell their depositary receipts Goodbody & Company, which had made a market in Transcon stock, might be interested (*id.*).

The suggestion that there would be a market for the depositary receipts was eminently reasonable. Transcon's stock was actively traded over the counter, and the prospect of Commission approval of the proposed acquisition of Queen would generate a market for depositary receipts representing Queen stock which would then be convertible into Transcon stock.

A key part of Interstate's argument that there was a secret agreement rests on the contention that such an agreement was necessary to solve a so-called "dilema" [sic] facing Transcon (JS 13). The dilemma is said to have been posed by the need to satisfy the demands of some of the selling stockholders for cash and at the same

time preserve the tax-free character of the transaction allegedly as part of a "B" reorganization. The fact is that there never was any such dilemma as Interstate claims and, accordingly, there never was any such need or motive to make the alleged secret agreement. If Transcon had been concerned that the payment of cash for the depositary receipts would jeopardize the tax-free status of the "B" reorganization, it would have been a simple matter to have cast the acquisition in the form of a statutory merger under Section 55-108 of the North Carolina Business Corporation Act which would have enabled Transcon to exchange stock to those sellers (not less than 51%) wishing stock without tax consequences under Sec. 368(a)(1)A, 354 and 361 of the Internal Revenue Code of 1954, as amended, and pay cash to the balance. The merger could have been effected with the consent of only 51% of the Queen stockholders and Transcon could then, pursuant to Section 368 (a)(2)(C), put the Queen business into a subsidiary, all without tax consequence to the Queen stockholders. (64a-65a, R. 64, ¶ 12). The result would have been precisely the same as was achieved under the so-called B reorganization. And since only 9% of the Queen shareholders sold their depositary receipts, far more than the 51% of Queen stock necessary to effect a statutory merger was available.

There is additional and compelling circumstantial evidence against the existence of a secret agreement for the cash purchase of the depositary receipts. The purchase of the depositary receipts representing less than 10% of Queen's outstanding stock was made in 14 different transactions over a 14-month period from June 15, 1964 to August 23, 1965, both before and after Mr. Burt informed the Commission that Transcon was buying the depositary receipts for cash. The sales were made at varying prices ranging

from $241.25 to $290.00 a share. The varying prices bore no constant relationship to the market price of Transcon stock; the prices were at discounts varying from 5% to 17% from the market price of Transcon stock (A167). An essential element of any agreement for the sale of stock would be the price. But it is clear from the actual sales that there could have been no agreement as to price. From this it is clear that there could not have been an agreement for Transcon to pay $250 per share as Interstate asserts at JS 11-13, or an agreement to pay any other amount.

Moreover, Interstate knew at the time of the hearing the names of the depositary bank and the brokers who handled certain sales, and that Mr. Love's son had sold some depositary receipts through an acquaintance at First Securities Corporation (A172-A173), but it made no effort to call any of them as witnesses at the hearing.

The circumstantial evidence recited above of the lack of any secret agreement is corroborated in the uncontradicted clear and convincing testimony of all of the witnesses who testified on this subject. Mr. Love (A172), Mr. Moore (A175), Mr. Scheitel (A168-A169) all testified that Transcon had made no prior commitment to make a market in Queen City depositary receipts. The Commission was amply justified by the corroborative circumstantial evidence in crediting this testimony.

B. *There Was No Reason for Transcon to Conceal Highway's Acquisition of Queen Depositary Receipts, and No Concealment in Fact*

There is no merit to Interstate's charge that the acquisition by Highway of 9% of the depositary receipts for Queen shares constituted a prior unauthorized control in violation of Interstate Commerce Act § 5(4), and that

Transcon's officers and General Counsel conspired to withhold knowledge of these purchases from the I.C.C. (JS 15, 26-36).

Transcon's original application to the I.C.C. for control of Queen was filed on May 7, 1964 and did not reveal Highway's acquisition of the depositary receipts, since the first of these purchases took place a month later on June 15, 1964 (A167). Within a week after the hearing, when Highway's purchases of depositary receipts amounted to 1,387 (about 6%), Mr. Goff, Transcon's General Counsel, furnished the I.C.C.'s Bureau of Enforcement with all records relating to Highway's purchases of these depositary receipts (R. 53-Reply of Transcon, 11/5/65, p. 5; Reply of Transcon, 12/27/65, p. 12; Reply of Transcon, 2/14/66, p. 35; Answer of Transcon, 8/9/65; Reply of Transcon, 1/24/66).

The hearing examiner (A126, n. 15), the I.C.C. (A55, A60), and the District Court (A14) each had full knowledge of the fact that Transcon's subsidiary, Highway, had ultimately purchased 9% of the Queen depositary receipts, and each held that this did not constitute a prior unauthorized acquisition of control (A14, A28, A60, A126-127).

Queen stock was very closely held (see list of shareholders on May 16, 1964 contract, R. 53-Exh. 14). It is virtually inconceivable that Highway's ownership of less than 10% could constitute control under these circumstances. (See pp. 38-39, *supra.*)

Transcon had in 1963 bought 21% of Safeway stock, and it never occurred to Interstate or Greyhound or anyone else to suggest that this 21% block might constitute control (A175).

On May 13, 1964, several months before the hearing before the I.C.C., Transcon moved that Service Coach Lines be dismissed as a carrier to be controlled in Docket MC-C-8744 on the ground that 33⅓% of the stock of Service did not constitute control. It is inconceivable that a short time later numerous individuals would conspire to commit perjury in order to conceal from the hearing examiner the fact that a subsidiary of Transcon had acquired Queen depositary receipts amounting at that time to only 6% of the outstanding shares.

There was no tax reason for Transcon to conspire to withhold information as to Highway's purchases of depositary receipts from the Commission. The acquisition of Queen depositary receipts by Highway was revealed to the Internal Revenue Service (e.g., 62a Drysdale aff. ¶6, R. 64) and was considered by Queen's tax counsel to present no serious tax problems, for the reasons which he stated as follows in his affidavit:

> "When I first learned of the purchases of the depositary receipts by Highway, I recognized that there was a possibility that the Revenue Service would consider these to be purchases by Transcon; although, in my view, they were not. While there are many Internal Revenue Code provisions under which stock owned by one party is treated as being owned by another related party, none of them was applicable to the case under consideration. It was also my view that if the Revenue Service did raise a question about the Highway purchases, the problem could be solved simply by having Highway dispose of the depositary receipts before the closing. I reasoned that if this were done, all of the Queen stock would be acquired by Transcon solely for

Transcon voting stock, and any possible Service objection on this score would be removed. I so advised Mr. Warren Goff, general counsel for Transcon, in discussing the matter with him on the telephone. It did not prove necessary, however, for Highway to dispose of the depositary receipts since the Revenue Service did not consider the purchase of depositary receipts by Highway to be attributable to Transcon and issued a favorable ruling on the transaction.

"The views expressed in paragraphs 7, 8 and 9 above are concurred in by two of my partners, each of whom held an important position in the office of the Tax Legislative Counsel, Treasury Department, which plays an important role in the drafting of tax legislation and Treasury Regulations" (63a-64a R. 64, ¶¶ 9, 10).

It is only by altering the record testimony, by deleting material portions that provide necessary context, and by inserting its own words, that Interstate is able to make its claims of perjury. Thus the testimony of Mr. Scheitel, as set forth by Interstate at page 28 of its Jurisdictional Statement appears to constitute a denial by Mr. Scheitel that he knew who bought some Queen *"depositary receipts."* If that was his testimony, it would indeed be false. The actual transcript (A168-A170) does not show, however, that he made such a denial. Although questions expressly directed to depositary receipts had been asked of Mr. Scheitel (A168-A169) the actual question involved here was directed to "Queen City stock" (A170). The context of the question shows the questioner apparently wanted to know whether any Queen stock had been marketed prior to the making of the May 16, 1964 contract, since such information would have at least tangential relevance to Transcon's

reasons for directing Queen shareholders to Goodbody & Company as a possible market for their depositary receipts (A168). The context of the question in answer to which Interstate claims the false testimony was given is extremely important and is as follows:

> "Q. Well, if—you will concede that if this transaction is not approved by the Commission, what Goodbody & Company is making a market in is not Transcontinental stock, but in *Queen City stock*, for which there is no market? A. I don't know that they are making a market in *Queen City stock*.
>
> (203) Q. But you know that *some* has been sold. A. I don't know who bought it.
>
> Q. Pardon me? A. *Queen City*—repeat your question, please.
>
> Q. You know that some has been sold? A. I was told some was sold." (Emphasis added)

It is most significant that Scheitel's answer ending with the words "Queen City stock" is immediately followed by the question: "But you know that some has been sold?" The word "some" plainly refers to "Queen City stock," and Scheitel apparently so understood it. If Mr. Scheitel construed the question in this manner or if he was not sure of the question, as the record indicates by what immediately followed Scheitel's allegedly false answer, there was no perjury. Interstate in its Jurisdictional Statement has deleted Scheitel's testimony ending with the words "Queen City stock" and substituted in place thereof a question and answer which ended with the words "the depositary receipts." After this bit of surgery, the record, according to Interstate, looks like this:

"'Q. You at no time discussed with any member of the Love family, or any other principal stockholder—there are five principal stockholders of Queen—the relative amount of discount that would be available to them at Goodbody and Company, that it would be ten or fifteen percent over the equivalent market price of shares of Transcontinental Bus System? A. I don't —we didn't even—there wasn't any assurance on our part at all that there was going to be a market for the depositary receipts.' (id. at A169)

'Q. But you know that some [depositary receipts] has been sold? A. I don't know who bought it.' (id. at A170)"

What Interstate has done is to delete eight questions and answers and to add "[depositary receipts]" and thus has deliberately juxtaposed a question directed at "depositary receipts' with an answer directed at "Queen City stock." Thus Scheitel's allegedly false testimony is placed by Interstate in a completely different context from that in which it was in fact given; the reference is changed from Queen City stock to depositary receipts. There is simply no justification or excuse whatsoever for Interstate deliberately attempting to distort the record in this manner.

Interstate has not offered any evidence to contradict the testimony of Mr. Love that he did not know who bought his depositary receipts or those of the Hardison family (A174), and Interstate made no effort to call as witnesses the employees of First Securities Corporation who handled the transaction, or Mr. Love's son, who had apparently made an earlier sale through an acquaintance at First Securities Corporation, or any of the four Hardisons. Inter-

state should not be permitted to repeat in this Court its reckless charge that this testimony was false.

The testimony of Mr. Moore now claimed by Interstate to be fraudulent (JS 29-30) follows a line of questions about whether Transcon had agreed to provide the funds to purchase depositary receipts or had set up a market for the depositary receipts. The answer "We have no part of it", which Interstate denominates as a denial that Transcon purchased the receipts, when read in context (A171-176) is a denial that Transcon had an agreement, commitment or part in the setting up of a market. It is most significant that Greyhound, whose attorney was then questioning Mr. Moore, did not understand this testimony as a denial of Transcon having purchased the depositary receipts.* There is no evidence that Mr. Moore's testimony was untrue. Indeed, it is fully corroborated by the clear evidence that there was no secret agreement or commitment on Transcon's part to purchase the depositary receipts.

Interstate's jurisdictional statement contains only a minute portion of the 1285 pages of testimony taken before the I.C.C. In this entire transcript no officer of Transcon was ever asked whether Transcon had ever bought any Queen depositary receipts or whether any subsidiary had bought any. Since Queen's existing officers and directors

* On July 9, 1965 on the basis of the disclosures that Transcon had acquired certain depositary receipts of Queen and Virginia, which appeared in the June 15, 1965 I.R.S. ruling (53a) Greyhound filed a complaint requesting an investigation (Docket No. MC-F-9165) to determine whether these acquisitions constituted an early acquisition of control in violation of Section 5(4) of the Interstate Commerce Act. Greyhound did not in that complaint, and has never, claimed that the testimony of Messrs. Moore, Scheitel and Love was false or misleading. Clearly Greyhound did not understand their testimony as Interstate now claims it should be read.

had remained in office, it was clear that there had been no transfer of control, and apparently no one considered such a question to be worth the asking.

C. *The Decision of the Commission Was Not the Result of the Allegedly False Testimony*

Interstate through Mr. Burt by mid-September of 1964 had advised the Bureau of Enforcement of the Commission of his belief that Transcon had purchased the depositary receipts for cash. (R. 55-2, Letter, Vice Chairman Webb to Burt, 18 Sept. 1964; R. 55-1, Letter, Merrill, Director of Bureau of Inquiry and Compliance to Burt, 18 Sept. 1964). Within a week after the hearings, the General Counsel of Transcon, Mr. Goff, furnished representatives of the Commission's Bureau of Enforcement, upon the latter's inquiry, with all records concerning Highway's purchase of depositary receipts. (R. 53-Reply of Transcon, 11/5/65, p. 5; Reply of Transcon, 12/27/65, p. 12; Reply of Transcon, 2/2/66, p. 35; Answer of Transcon, 8/9/65; Reply of Transcon, 1/24/66.) Thereafter, on at least nine separate occasions, Interstate charged in documents submitted to the Hearing Examiner or the Commission that Transcon had bought Queen depositary receipts for cash and that the Transcon witnesses had testified falsely to conceal these purchases.* The Commission took note of Interstate's charges of fraud (A52), expressly recognized Transcon's contention that there was no evidence that Transcon had any arrangement or agreement to purchase Queen depositary receipts (A56) and disposed of Interstate's secret agreement contention with the statement:

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* R. 53-Petition 10/11/65, Petition 12/7/65, Letter 12/8/65, Exceptions 1/3/66, Petition 2/21/66, Motion 2/24/66, Reply Brief 2/28/66, Reply Brief 3/1/66, Petition 5/26/66.

> "Nor is the purchase of the depositary receipts a partial consummation of the transactions, which are based on an exchange of shares of Transcon stock per shares of stock of the carriers to be acquired." (A60)

Under these circumstances, there is simply no basis for Interstate's contention that the decision of the Commission was a product of the very "fraud" which had been repeatedly charged before the Commission reached its decision in the pending Commission proceeding.

Moreover, we submit that the Commission's rejection of the fraud charges is amply warranted by the evidence, circumstantial and testimonial, which is referred to at pp. 41 to 45. The sum and substance of the matter is that appellant's charges of fraud go to the veracity of Messrs. Love, Moore and Scheitel. Interstate had conceded this, for in its brief in the District Court it stated: "• • • • The veracity of the testimony of the Transcon witnesses is placed in issue [by the IRS Ruling, R. 53-Exh. 168]." It has long been settled that

> "The credibility of the witnesses and the weight of the evidence are for the Commission [ICC] and not for the courts, and its findings will not be reviewed here if supported by evidence." *Warehouse Co.* v. *United States,* 283 U.S. 501, 508 (1931).

See also: *N.L.R.B.* v. *Marcus Trucking Co.,* 286 F. 2d 583, 589 (2d Cir. 1961); *Federation of Union Representatives* v. *N.L.R.B.,* 339 F. 2d 1926, 129 (2d Cir. 1964); *William N. Feinstein & Co.* v. *United States,* 209 F. Supp. 613, 619 (S.D.N.Y. 1962) (single judge), *aff'd* 317 F. 2d 509 (2d Cir. 1963).

The correctness of the Commission's decision is also apparent from the flimsy and wholly unreliable character of the assertions upon which Interstate predicates its charge of fraud. Some examples of these irresponsible charges are:

(1) At page 34 of its Jurisdictional Statement, Interstate asserts that Transcon concealed its 100% ownership in the subsidiary which acquired the depositary receipts and that this 100% ownership was material to the I.R.S. tax ruling. The fact is that Transcon never at any time concealed its 100% ownership of its subsidiary. At the time Transcon was authorized to acquire 100% of the subsidiary, Transcon prepared a press release setting forth the facts. (R. 53—attached to motion of Interstate in Docket No. MC-C-4969, 3/9/66). This was followed by the publication in the Wall Street Journal on August 3, 1964 of an article describing the transaction and stating "Transcontinental said it will have acquired 100% of the capital stock of Western Sales [Transcon's subsidiary]." Moreover, as appears from the affidavit of tax counsel, the transitory 100% ownership of the subsidiary was not material to the I.R.S. tax ruling. (R. 64, ¶ 9, 63a, 64a).

(2) At page 32 of the Jurisdictional Statement, Interstate describes Jones, attorney for the Queen stockholders, as "embarrassed" upon learning in November of 1964 that Transcon had acquired depository receipts through its subsidiary. Interstate's choice of the word "embarrassed" is important because it is designed to show that the attorney for one of the participants in the "fraud" was concerned to discover what was going on. But the characterization "embarrassed" is simply made up out of whole cloth. There is absolutely nothing whatsoever in the record reference cited

by Interstate (R. 41-43) or anywhere else to support the assertion that Mr. Jones was "embarrassed."

(3) Interstate asserts that the Commission has conceded Scheitel's testimony to be false (JS 67 n. 2, 70). The Commission at no time has ever conceded that Scheitel's testimony was false. What the Commission's attorney said was that, if Scheitel's testimony can be read as a denial of knowledge of the purchases, it is false (JS 31). This is obviously not a concession that Scheitel in fact testified that he did not know who bought the depositary receipts.

(4) Interstate's charges of fraud are the product of piling one flimsy inference on another. Interstate begins by printing Scheitel's answer "I don't know who bought it" out of context. The answer is distorted by inserting "[depositary receipts]" after "some," and by deleting eight questions and answers without use of ellipsis dots in order to juxtapose a question about depositary receipts with an answer about Queen City stock. (JS 28). The answer is thus stamped as a reference to the depositary receipts and not Queen stock. Interstate then blandly, repeatedly and incorrectly avers that the I.C.C. has conceded Scheitel's testimony to be false. (JS 31, 67 n. 2, 70). This purported concession by the I.C.C. is then expanded to a further concession that the testimony of all three witnesses, Moore and Love as well as Scheitel, is false. (JS 67). There is simply nothing at all in the record on which to base the statement that the Commission conceded the testimony of Moore, Love and Scheitel to be false. Next, Interstate would transmute Scheitel's alleged false denial of knowledge of the purchase of depositary receipts into rendering false Moore's and Love's denial of any *commitment* to buy the depositary receipts.

(5) To all this misstatement and false innuendo must be added Interstate's totally false representations that (a) Transcon delayed disclosing the purchase of the deposit receipts to the I.R.S. until after settlement of the North Carolina suit (pp. 10, 11, *supra*) and (b) Interstate was induced to settle the North Carolina litigation by the testimony of Moore, Scheitel and Love (pp. 10, 11, 12, *supra*). and to these false representations must be added Interstate's distortion of Scheitel's testimony at p. 28 of the Jurisdictional Statement to make it appear that Scheitel was referring to depositary receipts instead of Queen stock.

CONCLUSION

Interstate Investors, Inc. is not a carrier. Interstate claims no interest in Virginia and Safeway—two of the carriers whose acquisition is challenged here. As to the third, Queen, Interstate in 1965 sold and released its claim for $25,425. The Three Judge District Court below properly held that if Interstate wishes to resuscitate its interest in Queen, it must do so in an appropriate proceeding in the Western District of North Carolina, where the settlement was approved and the order dismissing Interstate's claim with prejudice was entered. Interstate is without any interest in Transcon's acquisition of Queen, Safeway and Virginia and thus has no standing in Federal court to bring an action to challenge the I.C.C. orders which authorized those acquisitions.

The I.C.C. orders are supported by substantial evidence in the record, and disclose that the I.C.C. correctly applied the appropriate standards in appraising the public interest in ruling on Transcon's applications.

The District Court correctly held that the I.C.C. orders were not the product of fraud.

Therefore, intervenor-defendant-appellee Transcon respectfully requests that the appeal of Interstate Investors, Inc. be dismissed on the ground that plaintiff-appellant lacks the requisite standing to prosecute this appeal, or alternatively, that the Court summarily affirm the order of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

Respectfully submitted,

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